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JUL 24 1969
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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1969

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA,
Petitioner,

v.

SINCLAIR OIL AND GAS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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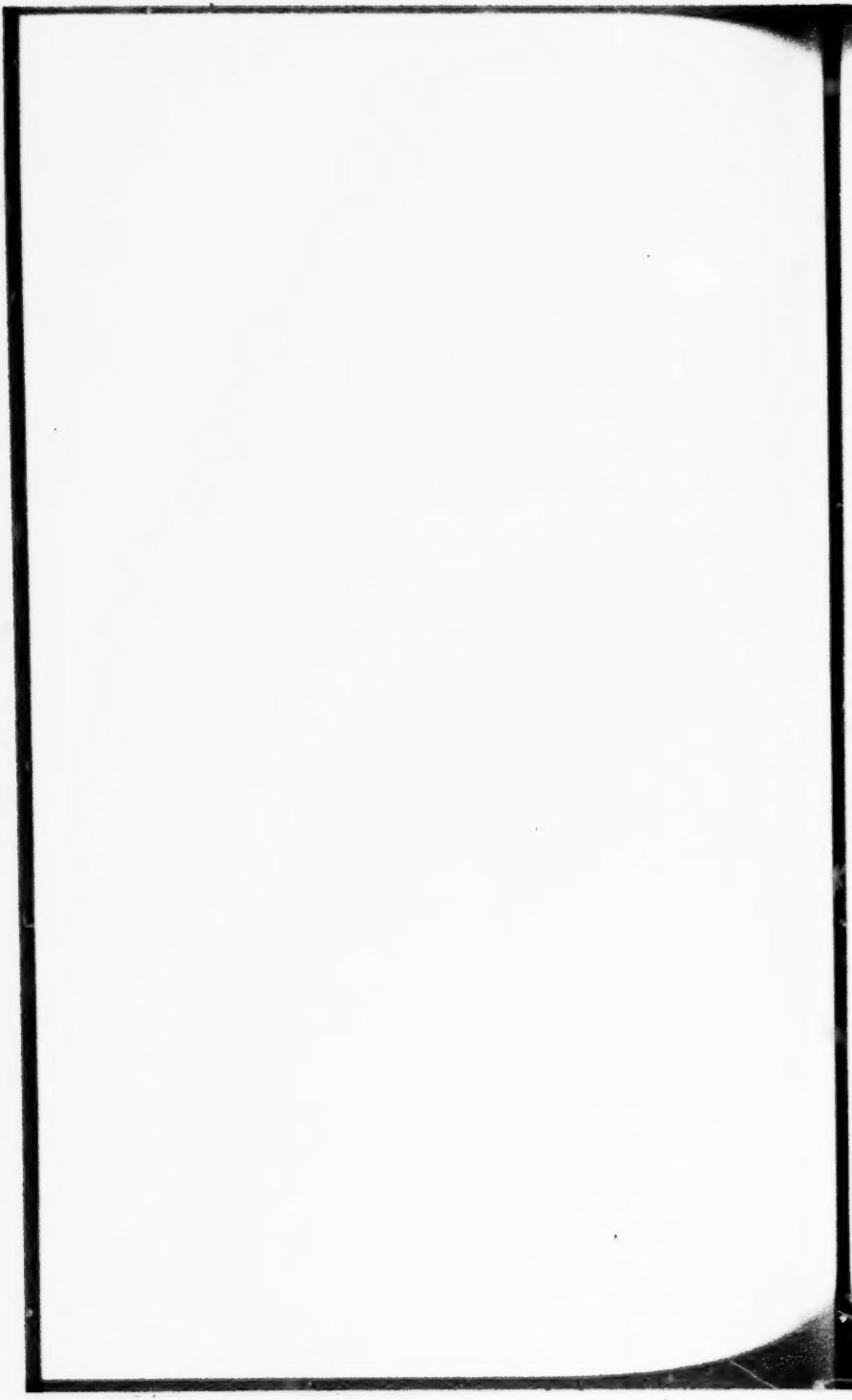

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1969

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA,

Petitioner,

v.

SINCLAIR OIL AND GAS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ASHTON J. MOUTON, Collector of Revenue for the State of Louisiana does hereby petition this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, in Number 25,751 of that Court, Ashton J. Mouton, Collector of Revenue, State of Louisiana versus Sinclair Oil and Gas Company.

OPINIONS BELOW

The petition for a rehearing was denied without written opinion by the United States Court of Appeals for the Fifth Circuit. The written opinion on the case by the Court of Appeals for the Fifth Circuit has not yet been reported. Both the written opinion and the

application for rehearing are attached hereto as Appendix A.

The United States District Court for the Eastern District of Louisiana, Baton Rouge Division, refused to remand this case to the Louisiana District Court from whence it had been removed. It then granted summary judgment to Sinclair Oil and Gas Company simply by an order to that effect entered in the record.

JURISDICTION

The decree of the United States Court of Appeals for the Fifth Circuit was entered and signed on April 22, 1969. A petition for a rehearing was denied on May 19, 1969. An order staying the mandate of the court to and including July 25, 1969, was signed by the Deputy Clerk on May 23, 1969.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1) and Title 28 U.S.C., Sec. 1651(a).

A writ of certiorari is applied for on the ground that the courts below lacked jurisdiction as a matter of federal law and that a suit filed in a state court cannot be removed to a federal court when the federal court would have no jurisdiction if filed in that court.

QUESTIONS PRESENTED FOR REVIEW

1.

Under federal law does a federal district court have jurisdiction of a suit to determine the legality of state taxes when the State involved provides the tax-

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payer a plain, speedy and efficient remedy in its own courts for the contest of the taxes asserted by the State?

2.

In the alternative, only in the event this Court determines question number one adverse to the Collector, is the federal district court required to stay its hand until the question of the legality of a State tax is determined in the state court when the question is there pending?

STATUTES INVOLVED

Title 28, United States Code, Section 1331, relative to a federal question.

Title 28, United States Code, Section 1332, relative to diversity of citizenship.

Title 28, United States Code, Section 1341, relative to taxes by states.

Title 47, Louisiana Revised Statutes of 1950, Section 1576, relative to the remedy provided by Louisiana law for the recovery of taxes paid under protest.

The full text of the above sections are set out in Appendix A.

STATEMENT OF THE CASE

This case was originally filed in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana. The object of the suit was to collect certain state severance taxes which the Collector of Revenue, State of Louisiana, hereinafter referred to as "Collector", claimed were due by the defendant,

Sinclair Oil and Gas Company, hereinafter referred to as, "Sinclair".

The taxes which the Collector claimed as due are imposed by state law. LSA—R.S. 47:631:

> §631 Imposition of tax
>
> Taxes as authorized by Section 21 of Article X of the Constitution of Louisiana, are hereby levied upon all natural resources severed from the soil or water, including all forms of timber, including pulp woods, and turpentine and other forest products; minerals such as oil, gas, natural gasoline, distillate, condensate, casinghead gasoline, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells and other natural deposits; and the salt content in brine.

At no time did the Collector assert the taxes claimed were due under any federal law and at no time did the Collector assert any federal law as a basis of his claim. Sinclair was not threatened by any irreparable injury nor has it ever claimed that it would be. Sinclair was not required to pay any of the taxes asserted until it had had its day in the Louisiana Courts and in the United States Supreme Court if it chose to apply for a writ of certiorari and that writ had been granted. That is because Louisiana provided a plain, speedy and efficient remedy in its own courts for the contest of taxes.

Sinclair answered the suit and asserted as a defense allegations to the effect that the oil and gas against which the Collector was asserting his claims for severance taxes were produced in Barksdale Air

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Force Base. Sinclair further answered to the effect that the Collector could not apply the tax to oil and gas produced in Barksdale because the base was an area of exclusive federal jurisdiction.

After the filing of the answer and the exceptions the Collector agreed to a stipulation proposed by Sinclair which showed that the oil and gas against which the tax was asserted by the Collector were produced within the confines of Barksdale Air Force Base.

Sinclair later removed this case to this Court on the grounds:

1. That the Collector was acting unconstitutionally and therefore individually, not in his official capacity as the Tax Collector of the State.
2. That the Collector's petition when considered with the stipulation agreed to by him raised a federal question that should be ruled on by the federal court.

The Collector moved to remand the case to the State Court on the grounds that:

1. The Collector was acting in his official capacity for the State and the taxes he was asserting against Sinclair do not inure to his benefit but to the exclusive benefit of the state. Therefore, since one of the parties was the State and since a State of the United States is not a citizen there was no diversity jurisdiction.
2. That the Collector presented no federal question to the State Court; that the federal question, if any, was presented by Sinclair as a defense and this did not make the state suit removable.

The lower court refused to remand this case; instead, it held that it had jurisdiction and then rendered summary judgment for Sinclair.

ARGUMENT ON QUESTIONS PRESENTED

1.

Argument on Question No. One.

It is respectfully submitted that a suit in a State Court cannot be removed to a federal district court in which jurisdiction does not exist under federal law. In the instant case jurisdiction in the federal district court to which the case was removed from State Court did not exist not only because of the two reasons stated by the Collector as grounds for a remand but also because the State of Louisiana provides a plain, speedy and efficient remedy in its own courts for the contest of taxes and when such a remedy is provided by a state court *Congress* has limited the jurisdiction of the federal district courts. This additional reason was also argued in the Court below. That Louisiana does provide a plain, speedy and efficient remedy in its own courts for the contest of taxes has been noted *with approval* by no less an authority than the United States Supreme Court. *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 296, 87 L.Ed. 1407, 1410, 63 S.Ct. at page 1072 (1943).

Both the District Court and the Circuit Court found that:

1. The suit in federal court was a suit against the Louisiana Collector of Revenue acting illegally in his individual capacity, and,

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2. The suit presented a federal question.

Based on the above two findings both lower courts concluded that they had jurisdiction. However, it is submitted that these two findings were not correct and neither were they sufficient to confer jurisdiction on the two lower courts because of the express statutory law limiting such jurisdiction in questions involving state taxes even when there is both diversity and a federal question where a state provides a plain, efficient and adequate remedy in the state court for the contest of such taxes from whence the cases can be taken to the United States Supreme Court.

Congress first expressed its will concerning this limitation by an act passed August 2, 1937, c. 726, Sec. 1, 50 Stat. 143, wherein it added the last sentence to the first paragraph of Section 24 of the Judicial Code as it then read. March 3, 1911, c. 231, Sec. 24, Par. 1, 36 Stat. 1091. Sec. 24 of the Judiciary Code had been previously amended on May 14, 1934, c. 283, Sec. 1, 48 Stat. 775, so that with the 1934 amendment and the 1937 amendment Sec. 24 of the Judiciary Code read as follows:

> The district courts shall have original jurisdiction as follows:
>
> Of all suits of a civil nature, *at common law or in equity*, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; *or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand*

dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. (italics supplied)

(The following was added by the 1934 amendment). Notwithstanding the foregoing provisions of this paragraph no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing,

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and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.

(The following was added by the 1937 amendment). *Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.*" (italics supplied)

The Judiciary Act of 1911 was codified in 1948. In that codification what was formerly the first paragraph of Section 24 became Title 28, United States Code, Sections 1331, 1332, 1341, 1342, 1345, 1354 and 1359. The House Committee report on the codification and any revisions made relative to the former first paragraph of Section 24 of the 1911 Judiciary Act are contained in "Revision of Title 28, United States Code, House Report 308, 80th Congress, 1st Session." Pertinent parts of the report as well as the Section 24 of the Judiciary Act of 1911 together with the 1934 and 1937 amendments are reproduced in the Appendix for the convenience of the court. The House Report clearly shows that no significant changes were made in the law as it was prior to codification with reference to the limitation of jurisdiction of federal district courts relative to the collection of state taxes except that in view of the then new Rules of Civil Procedure, the words, "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity."

(See House Report on Sections 1331, 1332, 1341 of Title 28 of United States Code, which are reproduced in the Appendix)

If we now rewrite the first paragraph of Sec. 24 of the Judiciary Act of 1911 as it appeared in 1937 when Congress first limited the district courts' jurisdiction in state tax matters, leaving out all portions thereof which do not pertain to the case at bar, it would read as follows:

> "The district courts shall have original jurisdiction as follows:
>
> Of all suits of a civil nature, *at common law or in equity* brought by the United States, . . . or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) *arises under the Constitution or laws of the United States . . . or* (b) *is between citizens of different states . . . Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state.*" (Italics supplied)"

When read as above the Collector submits that Congress in its first legislation limiting the jurisdiction of the district courts to entertain suit relating to the collection of state taxes clearly and unequivocally stated that the restraint was applicable to *all* such

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suits whether they were designated as suits at common law or in equity, provided, of course, a plain, speedy and efficient remedy existed in the courts of the state. Since the 1948 codification did not change that limitation in any way it follows that statutory federal law as it now stands does not give the district courts the authority to entertain and pass upon civil actions to recover state taxes where the state provides a plain, speedy and adequate procedure for such recovery in its own courts

The intention of Congress to limit the lower federal courts jurisdiction in all tax cases is made doubly clear when one considers the great debate which took place in the Senate when the 1934 amendment to the Judiciary Code was adopted. *Congressional Record, Volume 78, Part 2, 73rd Congress, 2nd Session, pages beginning at 1915, 2014 and 2238. On Senate Bill No. 752.* The 1934 amendment did not concern taxes but as it clearly appears from the debate on that amendment, it concerned the restriction of the federal courts' power relative to suits by public utilities. The case for the limitation of the lower federal courts' jurisdiction was clearly stated by Senator Johnson as reported in the Congressional Record above referred to, beginning at page 1915, second column.

> "The design of the measure is to correct what has become an intolerable evil. Those who are familiar at all with the various commissions which the States have set up for the regulation of public utilities and the determination of their rates will realize from their experience that the process is

interminable where not only the State courts may be resorted to by the public utility which questions the decision of the State regulatory commission, but the United States courts may be resorted to as well.

The bill takes no substantive right away from the public utility corporations. It enables, of course, the public utility corporation to pursue its remedy through all the courts of the States and ultimately through the United States Supreme Court itself, but it seeks to put the public utility as a litigant in the same category that citizens of the States would be put under like circumstances.

It would seem, from looking at the record of the various cases that have gone to the court of last resort, as if our public utility corporations maintain a circumlocution office the design of which is to rival, in the matter of finality of fixing of rates by the various States, the celebrated case of Jarndyce against Jarndyce.

The bill comes here not from one State, but it comes from many States of the Union. It has the approval practically of every public utility commission of every State that possesses such a commission. It has the approval, too, of those who have had great trouble and great labor and great expense in endeavoring justly to fix the rates of public utility corporations in the different States of the Union.

I have with me letters from different States, all approving the measure, all begging for the relief. I have one from California from its railroad commission and from the California Farm Bu-

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reau Federation, one from the Public Utilities Commission of the State of Colorado, from the Public Service Commission of Indiana at Indianapolis, from the Board of Railroad Commissioners of the State of Montana, from the National Association of Railroad and Utility Commissioners, which maintains an office in this city, from the Public Service Commission of the State of Nevada at Carson, from the Department of Public Service of the State of New York, from the Public Commission of Oregon, from the Public Service Commission of Wisconsin, and various others, all uniting in the plea for the passage of this bill and praying that regulation, which has been attempted by the States, may if just and fair, be ultimately put in force without the intolerable and interminable delays which have existed in the past.

Not only this, but the President himself dealt with the subject when he was Governor of New York, and he dealt with it in no uncertain tones.

In January 1930 President Roosevelt, then Governor of the State of New York, sent a special message to the New York Legislature, then in session, from which I quote:

The recent decision of the Federal court in the southern district of New York permitting the New York Telephone Co. drastically to raise its telephone rates brings to the fore in a striking way the whole question of interference by the United States courts with the regulatory powers of our public-service commission. * * *

It means that hearings and trials which rightfully should be held before our public-service commission or before State courts are, by a

scratch of the pen, transferred to a special master appointed by the Federal court. The State regulatory body * * * is laughed at by the utility seeking refuge with a special master, who is unequipped by experience and training, as well as by staff and assistants, to pursue that searching inquiry into the claims of the company which the consuming public is entitled to demand. The special master becomes the rate maker; the public-service commission becomes a mere legal fantasy.

This power of the Federal court must be abrogated.

This is the language of the President:

'Only the Congress can give the remedy. Legislation has been introduced in the Congress to carry out this purpose. * * * I recommend to your honorable bodies that you memorialize the Congress to pass this legislation.'

There have been classic examples during the last few years of the methods that public utilities pursue in order to delay and to hamper just regulation and to prevent the putting into effect of rates which are fixed by the public-utility commissions of the various States. I cannot better show the wrongs that have been permitted by the existing law, and the necessity for the measure which is today presented, than by reading to you from the Public Service Commission of the State of Montana its peculiar experience in relation to its endeavor to control and regulate Montana's public utilities. It is high time that the public utility was taught by the Congress of the United States that its rights are exactly the same as those of any citizen of any State, but that it has no greater

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rights and no higher privileges than any citizen of the State; and it is endeavored by this measure to put in the same category, so far as litigation is concerned, the public utility with the citizen of the State.

There is no reason in law, in equity, in justice, in governmental policy, indeed, in saying that two bites at the cherry, as it were—two sources of litigation—shall be open at the sweet will of the public utility, where but one is given to the ordinary citizen, and that a public utility may go on with its litigation in a State court until it thinks it may be defeated, and then go into a United States court, obtain its injunction there, refer the case to a master of its selection, who will go over the same ground that the public-utility commission has gone over and upon that evidence, that has once been taken, again take as it sees fit, through those who have little knowledge of the subject, the same evidence, and then substitute its will in the Federal court for the will of the State court and the will of the people, who are represented by their public-utility commission.

It is that we seek to prevent here. The Judiciary Committee, by a very large majority, reported the bill favorably. My two distinguished brethren—one from Vermont, the other from Rhode Island—are in opposition, and have presented a minority report; but I challenge them to present the view of a single State in opposition to the legislation that is proposed, or in opposition to curtailing the extraordinary and outrageous privilege, from the standpoint of litigation, that heretofore has been accorded to these public-utility corporations."

Opponents of the bill raised the question of constitutionality and also whether it was wise to so limit the jurisdiction of the federal courts in any event. The proponents won since that great debate there has been no question that it is the will of Congress that where a plain, speedy and efficient remedy for the contest of the public utility rates may be had in the state courts the use of the federal courts are denied to public utilities.

In 1937 Senator Johnson directed his attention to a similar situation which then existed relative to the federal courts' interference with the collection of state taxes. Senate Bill 1551 was introduced to limit the lower courts' jurisdiction and it was adopted in the form shown on page 9 of this brief. In the 1948 revision of the Judiciary Code the amendment was written as it appears in Title 48, U.S.C., Sec. 1341.

No great debate took place with reference to the 1937 amendment. In the report of the Committee on the Judiciary, Report No. 1035, 75th Congress, 1st Session, the Committee simply stated:

> "It should be emphasized that the bill does not take away any equitable right of the taxpayer or deprive him of his day in court. Specific provision is made that the suit will not be withdrawn from the jurisdiction of the Federal district court except where there is a plain, speedy, and efficient remedy at law or in equity in the courts of the State. A full hearing and judicial determination of the controversy is assured. An appeal to the Supreme Court of the United States is available as in other cases.

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The propriety of this kind of legislation was fully discussed by the Senate Judiciary Committee when the so-called Johnson Act of May 14, 1934, S. 752, Public, No. 222, was favorably reported and subsequently passed by the Congress.

The report on the Johnson bill pointed out that the continuance of the unjust discrimination between citizens of the State and foreign corporations doing business in such State has been the cause of much controversy. The controversies arising out of the use of the injunctive process in State tax cases would be eliminated by the passage of this bill."

Let us now look at the history of this litigation involving the same area, the same tax and, in most cases, the same parties. The legality of the Louisiana severance tax imposed on oil and gas produced from Barksdale Air Force Base was first litigated by the oil companies in the Louisiana Courts in 1955 in the case of *Murphy Corporation, et al v. Fontenot*, 255 La. 379, 73 So. 2d 180 (1954). The legality of the tax was upheld by the Louisiana Supreme Court and the United States Supreme Court denied certiorari. 348 U.S. 831, 99 L.Ed. 655, 75 S.Ct. 54. The oil companies then went into federal court to test the question. In the case of *Mississippi River Fuel Corporation v. Fontenot* the United States Court of Appeals for the Fifth Circuit upheld the legality of the tax. *Mississippi River Fuel Corporation v. Fontenot*, 5th C.A., 1956, 234 F. 2d 898. The United States Supreme Court denied writs. Cert. den. 352 U.S. 916, 1 L.Ed. 2d 122, 77 S.Ct. 213. After the loss in the Louisiana Supreme Court and

the loss in the federal Fifth Circuit the oil companies had no choice except to wait for an excuse to present the question to the courts again. This excuse arose in the case of *National Gas and Oil Corporation v. Waggonner*, 151 So. 2d 575 (1963), Cert. den. by the Louisiana Supreme Court, 244 La. 463, 152 So. 2d 561. This later case involved the imposition of an *ad valorem* tax on certain equipment the oil companies possessed in the area in question. This time the United States Supreme Court granted writs and held that the ad valorem tax could not be imposed because the equipment was located in an area of exclusive federal jurisdiction. *Humble Pipeline Company v. Waggonner*, 376 U.S. 369, 11 L.Ed. 2d 782, 84 S.Ct. 857 (1964). Using the Waggonner case as a spring board the oil companies then again tested the legality of the severance tax in the federal court. The federal court ruled against the oil companies. *Mississippi River Fuel Corporation v. Cocreham*, La. E.D., 1965, 247 F. Supp. 819, but on appeal the Fifth Circuit over the strenuous objection of the Collector as to its jurisdiction, declared the severance tax illegal on the basis of the Waggonner case although the Waggonner case was an ad valorem tax case. *Mississippi River Fuel Corporation v. Cocreham*, 5th C.A. 1967, 382 F. 2d 929. On application for a rehearing the Fifth Circuit, sitting as a three judge panel, refused to grant a rehearing by a two to one decision. So, in 1968 the question of the legality of the severance tax as applied to the oil companies operating in the area in question stood as follows:

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1. The legality of the tax upheld by the Louisiana Supreme Court in 1954. Certiorari denied by the United States Supreme Court.

2. The legality of the tax upheld by the United States Court of Appeals for the Fifth Circuit in 1956. Certiorari denied by the United States Supreme Court.

3. The legality of the tax overturned by the United States Court of Appeals for the Fifth Circuit in 1968. Rehearing denied by a two to one decision. Certiorari denied by the United States Supreme Court.

With the above history in mind the Collector filed this suit in the Louisiana courts with the idea that the Louisiana courts should have the opportunity to interpret the state laws which had been interpreted by the Fifth Circuit in the 1968 Mississippi River Fuel case. But the Collector has been hamstrung in this effort by the removal of this case to the federal courts. In so hamstringing the Collector it is respectfully submitted that the lower district court as well as the United States Court of Appeals for the Fifth Circuit has not only clearly disregarded the will of Congress in limiting the lower federal courts' jurisdiction as shown by the great debate which took place when the 1934 amendment to the Judiciary Code was considered but the Fifth Circuit has also placed the litigation of state taxes back in the jungle of state and federal concurrent jurisdiction and endless litigation as the history of the litigation of this particular state tax for the past 15 years so clearly shows.

PART II.

In the alternative, it is respectfully submitted that when the question of the legality of a state tax is pending in a state court and the state provides a plain, speedy and efficient remedy for the contest of the tax in the state court that even though a federal court may have jurisdiction still the federal court has no discretion but to stay its hand until the question is resolved in the state court.

The Collector will now show this court that even where there is *unquestioned federal jurisdiction* to hear a case, as in a suit between citizens of different states or the determination of a federal question if the taxpayer has a plain, adequate and efficient remedy at law in the state courts, the federal courts must not exercise that jurisdiction until the highest courts of the state whose statute is alleged to be unconstitutional or otherwise illegal has had an opportunity to pass on the illegality or unconstitutionality of the statute. This is the doctrine of abstention.

In *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 87 L.Ed. 1407, 63 St. Ct., 1070 (1943), the taxpayer brought suit in the District Court for the Eastern District of Louisiana against a Louisiana state officer charged with the administration of the Louisiana Unemployment Compensation Law. The prayer was for a judgment declaring the State law unconstitutional as applied to the plaintiff and their employees. The statute in question exacts of employers payment into the state unemployment insurance fund, in the nature of an excise tax upon the exercise of the

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right or privilege of employing individuals and measured by a percentage of the wages paid. The District Court held the law constitutional and so did the Fifth Circuit. The Supreme Court granted certiorari and specifically asked counsel:

> "to discuss in their briefs and on oral argument the question whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute."

In its opinion the court considered Act No. 330 of the 1938 Louisiana Legislature and held that the act, now LSA-R.S. 47:1576, provides an adequate remedy in the Louisiana state courts for the recovery of taxes paid under protest. Then the Supreme Court, quoting liberally from *Matthews v. Rodgers*, 284 U.S. 521, 76 L.Ed. 447, 52 S.Ct. 217 (1931), affirmed:

> ". . . but solely on the ground that, in the appropriate exercise of the Court's discretion, relief by way of declaratory judgment should have been denied." (319 U.S. 299, 301; 87 L.Ed. 1407, 1413)

Leiter Minerals v. United States, 352 U.S. 220, 1 L.Ed. 2d 267, 77 S.Ct. 287 (1956). In 1938 one Leiter conveyed certain lands to the United States with reservation of his mineral rights. Leiter subsequently transferred his mineral rights to Leiter Minerals, the claimant. No minerals were ever produced by either Leiter or his successor by virtue of the mineral reservation. In 1950 the United States granted a mineral lease to the

California Company which produced oil, gas and other minerals worth many millions of dollars. Leiter Minerals filed suit in the Louisiana State Courts to recover the value of all the minerals produced by the California Company on the ground that Leiter Minerals' mineral rights had never prescribed because of a 1940 Louisiana Act which provided that mineral rights in existence at the time Louisiana land was acquired by the United States were imprescriptible. The interpretation of the Louisiana statute was involved in the state suit. Then the United States brought suit to quiet title in its favor in the federal district court. The United States District Court held that since the United States was not a party to the state court action, title of the United States with respect to the mineral rights could be tried only in the suit in the federal court. This view was upheld by the Fifth Circuit but the United States Supreme Court modified the judgment of both the District Court and the Fifth Circuit. The Supreme Court stated at 1 L.Ed. 2d 275, 352 U.S. 228:

> "But the fact that the United States is not a party to the state court litigation does not mean that the federal court should initiate interpretation of a state statute. In fact, where questions of constitutionality are involved and the Government contends that an application of the state statute adverse to its interests would be unconstitutional our rule has been precisely the opposite: 'as questions of federal constitutional power have become more and more interwined with preliminary doubts about local law we have insisted that federal courts do not decide questions of constitution-

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ality on the basis of preliminary guesses regarding local law.' "

(Numerous citations.)

The Supreme Court then ordered the judgment of the Fifth Circuit and District Court modified so that jurisdiction was retained in the lower court but the court was to stay its hand until an authoritative opinion of the Louisiana Supreme Court as to the interpretation of the state statute was obtained.

As to the final disposition of the case the Louisiana Supreme Court did render an authoritative opinion in a suit for a declaratory judgment which was subsequently filed in the Louisiana Courts. *Leiter Minerals, Inc. v. California Co.*, (La. 1961), 241 La. 915, 132 So 2d 845. The United States Court of Appeals for the Fifth Circuit rendered judgment for Leiter Minerals in accordance with the interpretation of the Louisiana statute by the Louisiana Supreme Court. *Leiter Minerals, Inc. v. United States*, 5th Cir., 1964, 329 F. 2d 85.

In *Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 3 L.Ed. 2d 1058, 79 S.Ct. 1070 (1959), the City of Thibodaux, Louisiana filed a petition for expropriation in a Louisiana District Court, asserting a taking of the property of a private power company. The defendant removed the case to the United States District Court for the Eastern District of Louisiana on the basis of diversity of citizenship. After a pretrial conference the district judge, citing *Leiter Minerals*, supra, stayed the proceedings until the Supreme Court of Louisiana had been afforded

an opportunity to interpret the statute on which the city's expropriation order was based. 153 F. Supp. 515. The United States Court of Appeals for the Fifth Circuit reversed the District Court, 255 F. 2d 774, and on certiorari the United States Supreme Court reversed the Fifth Circuit and reinstated the judgment of the District Court, stating at 360 U.S. 27, 3 L.Ed. 2d 1061:

> "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law."

After the decisions of the United States Supreme Court in *Huffman*, supra, *Leiter Minerals*, supra, and *Louisiana Power and Light Co.*, supra, the Fifth Circuit had occasion to consider *City of Houston v. Standard Triumph Motor Co.*, 5th Cir., 1965, 347 F. 2d 194. Cert. denied, 382 U.S. 974, 15 L.Ed. 2d 466, 86 S.Ct. 539. The original question in that case was whether imported English automobiles were immune from Texas ad valorem taxation under the Import-Export Clause of the United States Constitution. But the original issue became secondary when the case reached this Court because the appeal turned on whether the District Court should have entertained the declaratory judgment suit at all. The United States Court of Appeals for the Fifth Circuit, after first discussing the two United States Supreme Court cases of *Matthews v. Rodgers*, supra, and *Great Lakes Dredge & Dock Co. v. Huffman*, supra, held: At 347 F. 2d 198:

> ". . . Wide as a Court's power must be in the

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exercise of its discretion whether to grant declaratory relief, the Supreme Court makes clear that 'it is the court's duty to withhold such relief' when, in the words of the Johnson Act, there is "a plain, speedy and efficient remedy . . . in the courts of the state. 319 U.S. at 300-301, 63 S.Ct. at 1074. This is the decision that the Sixth Circuit has twice reached. *Helmsley v. City of Detroit, Mich.*, 6 Cir., 1963, 320 F. 2d 476; *Wyandotte Chemicals Corp. v. City of Wyandotte*, 6 Cir., 1963, 321 F. 2d 927. The critical turning point is the adequacy of the state court remedies. See *Township of Hillsborough, Somerest County, New Jersey v. Cromwell*, 1946, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358; *Georgia Railroad & Banking Co. v. Redwine*, 1952, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335; *George F. Alger & Co. of Detroit, Michigan v. Peck*, S. D. Ohio, 1954, 119 F. Supp. 812, affirmed, 1954, 347 U.S. 984, 74 S.Ct. 853, 98 L.Ed. 1120, 1148; *Livingston v. United States*, E.D.S.C., 179 F. Supp. 9, affirmed, 1960, 364 U.S. 281 80 S.Ct. 1611, 4 L.Ed. 2d 1719. Certainly, after emphasizing the pre-Johnson Act equitable limitations congressionally approved and strengthened by the enactment, it is inconceivable that the Supreme Court intended to allow any discretion to grant declaratory relief where adequate state remedies were available."

Kaiser Steel Corporation v. Ranch Co., 391 U.S. 593, 20 L.Ed. 2d 835, 88 S.Ct. 1753 (1968), was a diversity action brought in the United States District Court for the District of New Mexico. Both the District Court and the Court of Appeals for the Tenth Circuit (388 F. 2d 257), rejected defendant's motion to stay

the federal action pending decision of the question of state law by the state court. The United States Supreme Court reversed and stated at 20 L.Ed. 2d 837:

> "The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issues, moreover, is truly a novel one. The question will eventually have to be resolved by the New Mexico Courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource."

Harrison v. N.A.A.C.P., 360 U.S. 167, 3 L.Ed. 2d 1152, 79 S.Ct. 1025 (1959). In this case registration and barratry statutes enacted by the Virginia Legislature as part of its general plan of massive resistance to the integration of schools of the state were challenged by the National Association for the Advancement of Colored People in the United States District Court for the Eastern District of Virginia as invalid under the Fourteenth Amendment. The District Court, finding the statutes free from ambiguity, declared them unconstitutional and enjoined their enforcement. (159 F. Supp. 503). The United States Supreme Court held, at 360 U.S. 176, 3 L.Ed. 2d 1158:

> "According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained

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from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question. In other words, we think that the District Court in dealing with Chapters 31, 32, and 35 should have followed the same course that it did with respect to Chapters 33 and 36.

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' *Matthews v. Rodgers*, 284 U.S. 521, 525, 76 L.Ed. 447, 452, 52 S.Ct. 217, as their 'contribution . . . in furthering the harmonious relation between state and federal authority . . .' *Railroad Company v. Pullman Company* 312 U.S. 496, 501, 85 L.Ed. 971, 61 S.Ct. 643. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."

Summarizing the above cases it can therefore be said with confidence that when the question of jurisdiction is put at issue in matters relating to state taxes, as was done in this case there must be an affirmative showing that the state has not provided a plain, speedy

and efficient remedy for the contest of the tax statute in the State Courts. *Matthew v. Rodgers*, supra and *Hillsborough Township v. Cromwell*, supra. In the instant case the United States Supreme Court has already held that Louisiana's present statute does provide a plain, speedy and efficient remedy in the State's Courts for the recovery of taxes paid under protest. *Great Lakes Dredge and Dock Co. v. Huffman*, supra. Therefore this suit should have been remanded by the District Court.

As to the *Great Lakes* case, supra, the United States Supreme Court has ruled that even in cases where there is jurisdiction in the federal courts the federal court must stay its hand in ruling on a defense based on the unconstitutionality of the state tax statute until the State Courts have had an opportunity to rule thereon, provided, of course, that the State provides a plain, speedy and efficient remedy in the State Courts. This court in *City of Houston*, supra, held that in such cases it is mandatory on the District Courts to stay their hand.

As to the cases of *Leiter Minerals*, supra, *Louisiana Power and Light Company*, supra, *Kaiser Steel Corporation*, supra, and *Harrison v. N.A.A.C.P.*, supra, the thrust of those United States Supreme Court opinions is that even in cases where there is unquestioned federal jurisdiction, the District Courts must stay their hands in any case where the unconstitutionality of any state law is contested if the state courts provide a plain, adequate and efficient remedy for the contest of the statute.

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In view of the above it is submitted that the District Court should have remanded this case to the Louisiana District Court, or at least stayed its hand until the Louisiana Court had ruled thereon.

PRAYER

In view of the foregoing the Petitioner, Ashton J. Mouton, Collector of Revenue, State of Louisiana, asks this Court:

1. To declare that the United States District Court below did not have jurisdiction of this case as a matter of federal law and to remand this case with orders that it be remanded to the Louisiana District Court.

2. In the alternative, and only in the event this Court should decide that the United States District Court below did have jurisdiction, that this case be remanded with orders that the lower court is to refrain from exercising its jurisdiction until an authoritative interpretation of the Louisiana constitutional provision and statutes involved in this case is made by the Louisiana Supreme Court.

Respectfully submitted,

Emmett E. Batson

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CERTIFICATE OF SERVICE

I, EMMETT E. BATSON, attorney of record for petitioner, do hereby certify that I have this day served a copy of the foregoing petition with appendix on the Solicitor General of the United States and on each of the attorneys of record of the respondent as shown below by depositing same in the United States Post Office with sufficient air mail postage prepaid to those over 500 miles away and first class postage to those less than 500 miles distant.

Emmett E. Batson

EMMETT E. BATSON,
Counsel of Record.

Mr. Clyde R. Brown,
Attorney at Law,
Ouachita National Bank Building,
Monroe, Louisiana.

Solicitor General of the United States,
Department of Justice,
Washington, D. C. 20530

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 26751

D. C. Docket No. Civ. 68-105

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA
Plaintiff-Appellant,

VERSUS

SINCLAIR OIL AND GAS COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before AINSWORTH and SIMPSON, Circuit Judges, and MITCHELL, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: April 22, 1969

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26751

ASHTON J. MOUTON, COLLECTOR OF REVENUE, STATE OF LOUISIANA,
Plaintiff-Appellant,

VERSUS

SINCLAIR OIL AND GAS COMPANY
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(April 22, 1969)

Before AINSWORTH and SIMPSON, Circuit Judges, and MITCHELL, District Judge.

PER CURIAM: This suit was originally filed by the Louisiana Collector of Revenue in a Louisiana state court to collect certain state severance taxes claimed to be due by defendant Sinclair Oil and Gas Company. Sinclair removed the suit to the federal district court and the Collector's motion to remand for lack of jurisdiction was denied. Sinclair's motion for summary judgment based on our prior holding in *Mississippi River Fuel Corporation v. Cocreham*, 5 Cir., 1967, 382

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F. 2d 929, rehearing denied, 1968, 390 F. 2d 34, cert. denied, 390 U. S. 1015, 88 S. Ct. 1264 (1968), was granted and the Collector of Revenue has appealed.

All of the legal contentions raised by the Collector in this case have heretofore been considered and ruled on adversely to him by this Court in the *Mississippi River Fuel* case. (See our per curiam decision released this day in the companion cases of *Shell v. Mouton*, No. 26493, and *Mouton v. Shell*, No. 26730.)

Nor is there any merit in the Collector's contention that this suit was improperly removed from the Louisiana state court to the federal district court since it is apparent that the federal court has jurisdiction both under diversity of citizenship, 28 U.S.C. § 1332, in that the Collector is acting unconstitutionally and therefore in an individual capacity and not as the official representative of the State of Louisiana, and because a federal question is presented, 28 U.S.C. § 1331, in that the Collector is attempting to collect severance taxes on oil and gas produced from a federal military enclave, Barksdale Air Force Base, Louisiana, on which the United States has exclusive jurisdiction as provided by Article I, Section 8, Clause 17, of the United States Constitution. See *Mississippi River Fuel Corporation*, supra at 934, citing *Georgia R. R. & Banking Co. v. Redwine*, 342 U. S. 299, 72 S. Ct. 321 (1952), and *Ex-parte Young*, 209 U. S. 123, 28 S. Ct. 441 (1908), in support thereof. It was proper, under 28 U.S.C. § 1446, to consider the stipulation of fact, together with the allegations of the complaint, on the petition of the Collector for removal.

Being of the opinion, therefore, that our holding in *Mississippi River Fuel*, supra, is conclusive as to all the legal issues presented in this case, the judgment appealed from is

AFFIRMED.

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March 3, 1911, c. 231, Sec. 24, Paragraph 1, 36 Stat. 1091.

SEC. 24. The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however*, That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

May 14, 1934, c. 283, Sec. 1, 48 Stat. 775.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph

of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

August 21, 1937, c. 726, Sec. 1, 50 Stat. 738.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

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28 United States Code, Sec. 1331. (1948 revision)

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

House Committee Report on the above revision. Revision of Title 28, United States Code, House Report 308, 80th Congress, 1st Session.

SECTION 1331–SECTION REVISED

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Jurisdiction of federal questions arising under other sections of this chapter is not dependent

upon the amount in controversy. (See annotations under section 41 of title 28, U. S. C. A., and 35 C. J. S., p. 833 et seq., §§ 30–43. See, also, reviser's note under section 1332 of this title.

Words "wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in *United States* v. *Sayward*, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; *Fishback* v. *Western Union Tel. Co.*, 16 S. Ct. 506, 161 U. S. 96, 40 L.Ed. 630; and *Halt* v. *Indiana Manufacturing Co.*, 1900, 20 S. Ct. 272, 176 U. S. 68, 44 L. Ed. 374.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to conform with Rule 2 of the Federal Rules of Civil Procedure.

Words "or treaties" were substituted for "or treaties made, or which shall be made under their authority," for purposes of brevity.

The remaining provisions of section 41 (1) of title 28, U. S. C., 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title.

Changes were made in arrangement and phraseology.

28 United States Code, Sec. 1332, (1948 Revision)

§ 1332. Diversity of citizenship; amount in controversy; costs

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(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any

State by which the insurer has been incorporated, and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, Stat. 445.

House Committee report on above section. Revision of Title 28, United States Code, House Report 308, 80th Congress, 1st Session.

SECTION 1332-SECTION REVISED

Based on title 28, U. S. C., 1940 ed., § 41 (1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41 (1) of title 28, U. S. C., 1940 ed., are incorporated in sections 1331, 1341, 1342, 1345, 1354, and 1359 of this title. (See reviser's notes under said sections.)

Jurisdiction conferred by other sections of this chapter, except section 1335, is not dependent upon diversity of citizenship. (See annotations under section 41 of title 28, U. S. C. A., and 35 C. J. S., p. 833; et seq., §§ 30–43. See, also, reviser's note under section 1331 of this title.) As to citizenship of bank where jurisdiction depends upon diversity of citizenship, see section 1348 of this title.

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Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" in order to conform to Rule 2 of the Federal Rules of Civil Procedure.

Words "or citizens of the District of Columbia, Territory of Hawaii, or Alaska, and any State or Territory" which were inserted by the amendatory Act April 20, 1940, are omitted. The word "States" is defined in this section and enumeration of the references is unnecessary.

The revised section conforms with the views of Philip F. Herrick, United States Attorney, Puerto Rico, who observed that the Act of April 20, 1940 permitted action between a citizen of Hawaii and of Puerto Rico, but not between a citizen of New York and Puerto Rico, in the district court.

This changes the law to insure uniformity. The 1940 amendment applied only to the provision as to controversies between "citizens of different States." The new definition in subsection (b) extends the 1940 amendment to apply to controversies between citizens of the Territories or the District of Columbia, and foreign states or citizens or subjects thereof.

The diversity of citizenship language of section 41 (1) of title 28, U. S. C., 1940 ed., as amended in 1940, was described as ambiguous in *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385, 386. In that case the 1940 amendments was held unconstitutional insofar as it affected the District of Columbia. However, two other district courts upheld the amendment. *Winkler* v. *Daniels*, D. C.

Va. 1942, 43 F. Supp. 265; *Glaeser* v. *Acacia Mutual Life Assn.*, D. C. Cal. 1944, 55 F. Supp. 925.

This section is intended to cover all diversity of citizenship instances in civil actions in accordance with the judicial construction of the language in the original section 41 (1) of title 28, U. S. C., 1940 ed. Therefore, the revised language covers civil actions between—

Citizens of a State, and citizens of other States and foreign states or citizens or subjects thereof;

Citizens of a Territory or the District of Columbia, and foreign states or citizens or subjects thereof;

Citizens of different States;

Citizens of different Territories;

Citizens of a State, and citizens of Territories;

Citizens of a State or Territory, and Citizens of the District of Columbia;

Citizens of a State, and foreign states or citizens or subjects thereof.

The revised section removes an uncertainty referred to in the McGarry case, supra, as to whether Congress intended to permit citizens of the Territories or the District of Columbia to sue a State or Territory itself rather than the citizens thereof. The court observed that "Congress could hardly have had such intention."

The sentence "The foregoing provisions as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases men-

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tioned in the succeeding paragraphs of this section" was omitted as unnecessary. Those paragraphs are (2)–(28) of said section 41 of title 28, U. S. C., 1940 ed., which are revised and incorporated in this chapter and, except for those relating to actions against the United States and interpleader, contains no provision as to a sum or value necessary to confer jurisdiction. Consequently the omitted sentence is covered by excluding such requirement.

Section 41 (1) of title 28, U. S. C., 1940 ed., as originally enacted, purported to include all jurisdictional provisions relating to the district courts. Subsequently, many special jurisdictional provisions were enacted and incorporated in other titles of the U. S. C., 1940 ed., as follows:

28 United States Code, Sec. 1341 (As it now reads)

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932.

House Committee Report on above section. Revision of Title 28, United States Code, House Report 308, 80th Congress, 1st Session.

SECTION 1341–SECTION REVISED

Based on title 28, U. S. C., 1940 ed., § 41 (1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21,

1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

This section restates the last sentence of section 41 (1) of title 28, U. S. C., 1940 ed.

Other provisions of section 41 (1) of title 28, U. S. C., 1940 ed., are incorporated in sections 1331, 1332, 1342, 1345, 1354, and 1359 of this title.

Words "at law or in equity" before "in the courts of such State" were omitted as unnecessary.

Words "civil action" were substituted for "suit" in view of rule 2 of the Federal Rules of Civil Procedure.

Words "under State law" were substituted for "imposed by or pursuant to the laws of any State" for the same reason.

Title 47, Section 1576, Louisiana Revised Statutes of 1950.

§ 1576. Payment of tax under protest; remedy at law for recovery

A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount paid shall be

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segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Subtitle, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such

person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

ASHTON J. MOUTON, COLLECTOR OF REVENUE,
STATE OF LOUISIANA,

Plaintiff,

v.

SINCLAIR OIL AND GAS COMPANY,

Defendant.

CIVIL ACTION No. 68-105

ORDER AND JUDGMENT

This cause came on to be heard on motion of the Plaintiff to remand the same to the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, and on motion of Defendant for summary judgment and on cross-motion of the Plaintiff for summary judgment, and the Court having considered the record of the cause in the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, attached to Defendant's petition for removal, including the stipulation of the parties, and having heard the argument of counsel, and due deliberation having been had thereon, it is.

(1) Ordered that this Court has jurisdiction of this cause, and, therefore, Plaintiff's motion to remand be, and it is hereby, denied;

(2) Ordered that Plaintiff's cross-motion for summary judgment be, and it is hereby, denied;

(3) Ordered, the Court finding that upon the pleadings and admissions on file that there is no genuine issue as to any fact herein, that, as a matter of law, Defendant is entitled to the relief prayed for in its motion for a summary judgment for the reasons and conclusions set out by the Fifth Circuit Court of Appeals in Mississippi River Fuel Corporation v. Cocreham, 382 F. 2d 929 (5th Cir. 1967), writs refused 88 S. Ct. 1264 (1968), that, accordingly, Defendant's said motion for summary judgment be, and the same is hereby, granted, and that the Plaintiff have and recover nothing by his suit.

DATED July 31, 1968

E. GORDON WEST
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Emmett E. Batson, attorney of record for petitioner, do hereby certify that I have this day served a copy of the foregoing order and judgment on the Solicitor General of the United States and on the attorney of record for the respondent as shown below by depositing same in the United States Post Office with sufficient air mail postage prepaid to those over 500 miles away and first class postage to those less than 500 miles distant.

Emmett E. Batson

EMMETT E. BATSON
Counsel of Record

Mr. Clyde R. Brown
Attorney at Law
Ouachita National Bank Building
Monroe, Louisiana

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530